Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

May 2004

A petition seeking review of a decision of the FEHC must be filed within 30 days after the decision is final. *See, Fair Employment and Housing Commission v. Sup. Ct.* (Cal.App.2nd Dist., Feb. 5, 2004) 115 Cal.App.4th 629 [9 Cal.Rptr. 3rd 409, 2004 DJ DAR 1381].

Employer's Unreasonable Quest to Reverse Workers' Compensation Decision Leads to Liability for Additional Attorney Fees. Decisions of the Workers' Compensation Appeals Board are not subject to judicial review except by way of a petition for writ of review in the Court of Appeal. As with other writ petitions, the appellate court may reject such a petition by a simple order. But such a petition should not be filed routinely. *Labor Code* § 5801 provides that, where the employee prevails and the appellate court finds "no reasonable basis for the petition," the court must remand the matter for an award of additional attorney fees. Such fees must be awarded where an employer claims insufficient evidence even though the award is supported by the testimony of a competent physician, where the employer raises an issue for the first time in the Court of Appeal, or, in general, when the court concludes that the petition is frivolous. *See, Crown Appliance v. Workers' Compensation Appeals Board* (Wong) (Cal. App. 5th Dist, Feb. 5, 2004) 115 Cal.App.4th 620 [9 Cal.Rptr.3rd 415, 2004 DJ DAR 1340]

New statute of limitations for personal injuries does not apply retroactively. In 2002, the legislature amended *CCP* § 340(3) to delete the one-year limitations period for personal injury actions. At the same time, the legislature adopted *CCP* § 335.1; the new section now provides a two-year statute of limitations for such actions. These changes became effective January 1, 2003.

Until now it was an open question whether the new statute would be applied retroactively, i.e. would the two year statute apply to personal injury actions that accrued during 2001 that had become time-barred under the old statute during the year 2002, before the effective date of the new statute. In *Krupnick v. Duke Energy Morro Bay, L.L.C.* (Feb. 18, 2004) 115 Cal.App.4th 1026 [2004 DJDAR 2119], the Second District Court of Appeal answered the question in the negative.

Mr. Krupnick fell on defendant's premises on January 26, 2001. The complaint was filed on January 8, 2003. Had the new statute applied, the complaint would have been timely. But Justice Yegan, writing for the court, examined the legislative history of the new legislation and concluded that the legislature did not intend to revive actions that had become time-barred when the new statute went into effect.

California may exercise jurisdiction over Nevada hotels. The Second District Court of Appeal, Division Three has held that Defendants who operate Nevada hotels and advertise in California, and engage in other activities purposefully directed at California residents are subject to the jurisdiction of the California courts. *Snowney v. Harrah's Entertainment, Inc.* (March 11, 2004) [2004 DJDAR 3189].

Cal-OSHA standards admissible to establish negligence. The Third District Court of Appeal has held that *Labor Code* § 6304.5, amended in 1999, makes evidence of Cal-OSHA standards admissible to establish negligence per se, except in actions against the state for violation of a mandatory duty. *Gradle v. Doppelmayr USA, Inc.* (Feb. 27, 2004) 116 Cal.App.4th 276 [2004 DJDAR 2589].

All is not lost when fee sharing agreement is invalid. Even though a fee sharing agreement was

Litigation Section Events

2004 State Bar of California Annual Meeting

October 7–10, 2004
Monterey, CA

For registration and information visit www.calbar.org/litigation

A Week in Legal London

June 28–July 2, 2004

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Jury Instructions

We would like to hear about any problems or experiences you've had with the new jury instructions. Please provide your comments by sending them to Paul Renne at PRenne@cooley.com or to Rick Seabolt at RLSeabolt@HRBlaw.com

invalid under Rule 2-200 of the *Rules of Professional Conduct*, the referring attorney is entitled to recover in *quantum meruit* for legal services rendered on behalf of a client. *Huskinson & Brown v. Wolf* (Feb. 23, 2004) 32 Cal.4th 453, [84 P.3rd 379, 2004 DJDAR 2254].

Be careful with your § 998 offer to settle. Attorneys for Thrifty drug stores paid $280,000 to settle a claim resulting from their defective *CCP* § 998 offer to settle. The offer failed to specify that each party would bear its own costs and fees. After it was accepted, the trial court awarded the other parties their attorney fees in addition to the amount offered. *Thrifty Payless v. Arter et al.* (March 1, 2004) (*Daily Journal Extra*, Page 15).

If you want the court to retain jurisdiction to enforce settlement, the judgment of dismissal must expressly reserve such jurisdiction.

The court loses subject matter jurisdiction when a case is dismissed. Even though *CCP* § 664.6 empowers the court to enforce certain settlement agreements by entering judgment in accordance with the terms of the settlement agreement, the court loses jurisdiction to do so once the action is dismissed. To avoid this problem, *CCP* § 664.6 was amended in 1994 to provide: "If requested by the parties, the court may retain jurisdiction…to enforce the settlement until performance in full of the terms of the settlement."

But it is not enough to merely provide for the retention of jurisdiction in the settlement agreement; the judgment of dismissal must expressly provide for the retention of jurisdiction. In *Hagan Engineering, Inc. v. Mills* (Jan. 29, 2003) 115 Cal.App.4th 1004, [9 Cal.Rptr.3d 723], ordered published, (Feb. 18, 2004) [2004 Cal. LEXIS 1568, 2004 Cal. Daily Op. Service 1397]. The parties' settlement agreement purported to vest the trial court with jurisdiction to enforce the settlement. The dismissal did not. The Hagan court held that the court lacked jurisdiction because parties cannot confer subject matter jurisdiction by their consent.

Suggestion: When faced with this situation, a potential remedy consists of a motion to set aside the dismissal for mistake under *CCP* § 473(b). *See*, *Weil & Brown, Cal. Prac.Guide: Civ. Proc. Before Trial* (TRG 2003) ¶¶ 12:981 *et seq*.

Confidentiality agreement does not prevent a waiver of attorney-client and work product privileges. Target of an SEC investigation disclosed certain documents covered under the attorney-client and work product privileges to government investigators under an agreement designed to protect the confidentiality of the documents. The government did not proceed with the matter. In a subsequent civil suit, the trial court ruled that the privileges had been waived regardless of the confidentiality agreement. The First District Court of Appeal, Division Four, affirmed. The court recognized that where "disclosure [of privileged materials] is reasonably necessary for the accomplishment of the purpose for which the lawyer…was consulted is not a waiver of the privilege. *Evid. Code* § 912(d). But here the disclosure to the government did not fit this exception to the general rule that disclosure waives the privileges. Although it may have furthered the client's purposes to cooperate with the SEC investigators, the disclosure was not "necessary for the accomplishment of the purpose for which the lawyer…was consulted." *McKesson HBOC, Inc. v. Sup. Ct.* (Feb. 20, 2004) 115 Cal.App.4th 1229, [2004 DJDAR 2257].

Note: for *Evid. Code* § 912(d) to apply the disclosure must be necessary for the lawyer to accomplish his or her assigned task. Thus a disclosure to a secretary, fellow attorney, or consultant retained to assist the lawyer, etc. does not waive the privilege.

Note: the attempt to avoid the waiver by way of a confidentiality agreement was ineffective. A disclosure to a third party who does not qualify under *Evid. Code* § 912(d) constitutes a waiver, regardless of whether the parties to that disclosure so intend.

Death is good cause for a continuance. Not surprisingly, the Second District Court of Appeal concluded recently: "If plaintiff's counsel's serious physical illness and its debilitating effects culminating in death during the final stages of litigation are not good cause for continuing a trial and reopening of discovery, there is no such thing as good cause." A peremptory writ, ordering the trial court to reverse an order denying the motion to continue the trial followed. *Hernandez v. Sup.Ct.* (Feb. 23, 2004) 115 Cal.App.4th 1242, [2004 DJDAR 2338].

Attorney-client privilege once again under attack. AB 2713 (Pavley) introduced in late February would authorize an attorney representing a governmental organization who learns of improper governmental activity to refer the matter to law enforcement under specified circumstances. A similar bill passed the legislature in 2002 but was vetoed by Governor Davis.

Fewer lawyers in the legislature. Larry Doyle, the State Bar's legislative representative reported in his March 5, 2004 newsletter that the number of the lawyers in the legislature is likely to decrease even further. He predicts that after the November election only 23.3% of the members of the assembly and 27.5% of the state senators will be lawyers. His newsletter compares to the percentages of lawyer-legislators in 1971 (46.7%), 1981 (38.3%), and 1991 (25%). Does this decrease reflect the public's decreasing respect for members of the legal profession or are fewer lawyers interested in a political career?